

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ARTHUR TAYLOR,

Defendant-Appellant.

UNPUBLISHED

May 31, 2002

No. 233924

Marquette Circuit Court

LC No. 00-037004-FC

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f). He was sentenced to three to fifteen years' imprisonment and appeals as of right. We affirm.

The victim was leaving the bar at closing time when a bar employee advised her that defendant would drive her home. After being pushed inside the car, the victim was told that she was going to have some fun with defendant. The victim testified that she was taken to defendant's apartment where she was vaginally and anally penetrated. The penetration stopped when the victim suffered an injury while being anally penetrated. The victim asked to call her husband for a ride home and represented that she would lie about her location. The victim waited outside for her husband to pick her up. The victim told her husband about the assault. They decided to call a police officer, who was a frequent customer at the restaurant where the victim worked. The officer instructed the victim to proceed to the hospital with the clothes she was wearing at the time of the assault, and a police officer would be at the hospital to take a statement.

Defendant testified that the victim was standing near the pay phone at the bar when she asked him for a ride, and he agreed. Defendant testified that, once inside the vehicle, the victim touched his genitals over his pants and asked to be taken to his apartment. Defendant testified that the victim practically threw off her clothing when they got inside his apartment. The couple engaged in consensual oral sex and sexual intercourse. Defendant testified that he did not ejaculate because he found the victim to be "old," "heavy," and "not attractive." Defendant was unsure if the two had engaged in anal intercourse, because the victim was "doing the driving." After the sexual encounter, the victim got dressed, smoked a cigarette, and made a telephone call. Defendant testified that there was no indication that the victim was injured or angry when she left his apartment.

Dr. Donald Snowden, an emergency room physician who treated the victim, found an anal fissure that was in an atypical position. Dr. Snowden concluded that this injury was not the result of a consensual act. Specifically, the injury was indicative of resistance, not reception to a sexual act. Defendant was convicted of one count of first-degree CSC, but acquitted of the charge of third-degree CSC.

Defendant first alleges that the trial court erred by allowing Dr. Snowden to testify that that the victim's anal fissure was the result of nonconsensual sexual penetration. We disagree. A trial court's determination that a witness is qualified to testify as an expert will not be reversed on appeal absent an abuse of discretion. *People v Swartz*, 171 Mich App 364, 374; 429 NW2d 905 (1988). An individual must be qualified based on knowledge, skill, experience, training, or education. *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995). The trial court must determine whether the expert testimony will assist the trier of fact, and an overly narrow test of qualifications should not be applied. *People v Whitfield*, 425 Mich 116, 122-123; 388 NW2d 206 (1986). Weakness in expertise does not preclude admission of expert testimony, but is a proper subject for cross-examination. *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987). Applying these rules, we cannot conclude that the trial court's determination to qualify Dr. Snowden as an expert was an abuse of discretion. Dr. Snowden testified that he did not have specific training in sexual assault interviews, but had attended conferences and read journal articles and textbooks addressing the investigation and treatment of sexual assault. See *Swartz, supra*.

The admissibility of expert testimony is within the trial court's discretion, and we will not reverse absent an abuse of discretion. *People v Phillips*, 246 Mich App 201, 203; 632 NW2d 154 (2001). Where force or coercion is relevant to a sexual assault case because the defendant claims that the acts are consensual, an expert's opinion on forcible penetration is admissible, provided that it is based on a proper factual foundation. *People v Smith*, 425 Mich 98, 115; 387 NW2d 814 (1986). In the present case, Dr. Snowden's determination, that the injury was not the result of a consensual act, was based on the nature of the injury and its location. This testimony assisted the trier of fact because the location of a typical anal fissure was not within the common knowledge of the jury. *Whitfield, supra*. Accordingly, we cannot conclude that admission of this testimony was an abuse of discretion. *Phillips, supra*.

Defendant next alleges that the trial court erred in admitting the testimony of the emergency room nurse.¹ We disagree. While the testimony of the emergency room nurse may have exceeded statements made for purposes of medical treatment, any error was harmless because the nurse's testimony was cumulative to the testimony of the victim. *People v Rodriguez*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

¹ Defendant also objects to the testimony of the victim's husband. After getting in the vehicle, the victim told her husband that she had been raped. The trial court concluded that the statement was admissible because it was not offered for the truth of the matter asserted and because it fell within the excited utterance exception, MRE 803(2). On appeal, defendant does not challenge the portion of the trial court's ruling that the statement was not hearsay. We agree with the trial court. MRE 801(c). The statement was not offered for the truth of the matter asserted, but to explain why the couple called police and proceeded to the emergency room. Accordingly, we need not address the alternative grounds for exclusion alleged by defendant.

Defendant next alleges that he was denied a fair trial due to prosecutorial misconduct during closing arguments. We disagree. Defendant failed to object to the alleged prosecutorial impropriety, and therefore, we review this issue for plain error. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, the defendant must demonstrate a clear or obvious error that affected substantial rights. *Id.* at 763. Once the defendant meets this burden, an appellate court has discretion to reverse. *Id.* Assuming error, defendant has failed to demonstrate that the plain, forfeited error affected substantial rights. The prosecutor was not required to confine argument to the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Furthermore, the trial court's instructions, that the jurors should not let sympathy or prejudice influence their judgment and that the lawyers' comments were not evidence, was sufficient to cure any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Affirmed.

/s/ Richard A. Griffin

/s/ Harold Hood

/s/ David